A

Mah Sau Cheong v Tan Eng Chin

B HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-408–07 OF 2017
CHOO KAH SING J
24 AUGUST 2021

C *Contract — Terms — Promissory or contingent — Whether agreement was a contingent contract — Whether formation of agreement was conditioned on materialisation of events — Whether plaintiff waived the condition — Whether termination of agreement was lawful — Whether contract was void by operation of law — Whether plaintiff estopped from terminating agreement — Contracts* D *Act 1950 ss 33 & 36*

This was the plaintiff's claim for a refund of money paid to the defendant pursuant to a share purchase agreement dated 7 January 2014 ('the SPA') which, according to the plaintiff's narrative, stood as terminated. According to E the SPA, the plaintiff agreed to purchase and the defendant agreed to sell 625,000 shares ('the shares') in a foreign incorporated company known Xianda International (HK) Ltd (which was previously known as Enersave International (HK) Ltd) for a consideration sum of RMB5,739,093. The parties agreed the amount of RMB5,739,093 was equivalent to RM3m F ('the consideration sum'). The payment of the consideration sum was in two tranches. The first payment totalling RM2,954,388.44 was to be paid within one month upon the signing of the SPA. The second payment or the final payment totalling RM45,611.56 was payable within two months from the 'closing date'. According to the plaintiff, he remitted a sum of G RM2,994,600.50 to a third party named South Malaysia Industries Bhd ('SMI Bhd') within a month after the SPA was executed. Although the money was paid to SMI Bhd, the payment was meant for the payment of the first tranche of the consideration sum, the plaintiff averred. The plaintiff further averred that in the SPA, the defendant had agreed that the full consideration H sum was to be paid to SMI Bhd. This was because one of the defendant's companies, ie Enersave Projects Sdn Bhd, owed a sum of RM2,994,600.50 to SMI Bhd. The plaintiff also further averred that the amount to be paid for the first tranche of consideration sum was only RM2,954,388.44, but he had paid RM2,994,600.50 to SMI Bhd. The extra sum of RM40,212.06 was meant to I settle the full outstanding debt, ie RM2,994,600.50, owing to SMI Bhd by the defendant's company. The plaintiff further averred that the extra payment of RM40,212.06 to SMI Bhd was to be treated as an advance to the defendant. There was no dispute in respect of the payment of the first tranche of the consideration sum which was paid within the stipulated time. With regards to

the payment of the second tranche of the consideration sum, the payment was supposed to be made within two months from the 'closing date' according to article 1.3(b) of the SPA. The definition of 'closing date' in article 4.1 referred to two specified events having materialised on or before 28 November 2014. The first event was that Xianda (Tianjin) Seawater Resources Development Co Ltd and Tianjin Economic-Technological Development Area (TEDA)/relevant authorities had to enter into an operation agreement ('the first event'); and the second event was the approval of the feasibility study report ('the second event'). It was not in dispute that the second event had materialised before 28 November 2014, but not the first event. The plaintiff contended that since the first event did not materialise on or before 28 November 2014, therefore, relying on article 4.6 of the SPA, the plaintiff was entitled to exercise his right to terminate the SPA. The entire plaintiff's claim was premised on article 4.6 of the SPA. The plaintiff asserted that since the first event, a specified event, did not materialise on the stipulated time, therefore, the plaintiff was entitled to terminate the SPA, and the money paid would become a term loan. The defendant would, therefore, become liable to repay the money to the plaintiff on or before 28 November 2016. On 25 July 2016, after a lapse of approximately one year and eight months from the deadline for the closing date, the plaintiff through his solicitors issued a letter of demand to inform the defendant that the plaintiff had decided to terminate the SPA. The amount of the 'purchase consideration' referred to in the solicitors' letter was for the sum of RMB5,739,093 (which is equivalent to RM3m as per the SPA). The defendant did not repay the plaintiff the demanded sum by the due date on 28 November 2016. Hence, the plaintiff brought an action against the defendant in July 2017. The defendant on the other hand, contended that the plaintiff had wrongfully terminated the SPA and his claim ought to be dismissed.

Held, dismissing the claim with costs:

(1) On the present facts, the court found that the formation of the SPA was not conditioned on the materialisation of the two events for the closing date. The non-happening of the two events by the deadline for the closing date did not render the SPA void. The signing of the operation agreement did not form part of the formation of the SPA. Based on articles 1.3(b) and 4.1 of the SPA, the happening of the first event, namely the signing of the operation agreement, was merely a condition relating to the performance of the term for payment of the second tranche of the consideration sum. The condition had nothing to do with the formation of the contract. The non-fulfilment of the condition did not strike at the formation of the SPA. Hence, the condition of the happening of the first event on or before the fixed time was 'merely related to an obligation or term of an already binding contract'. The condition of the happening of the first event on or before the closing date did not

qualify the SPA to be a contingent contract. For this reason, the court could not agree with the plaintiff's counsel's submission that the SPA was a contingent contract within the meaning of the CA (see paras 43–44).

(2) Another reason why the court could not agree with the plaintiff's counsel's submission that the SPA was a contingent contract was — if the SPA was a contingent contract, the SPA became void by operation of law if the condition was not fulfilled by a fixed time without any need for a party to elect to terminate the SPA. In the present case, article 4.6 of the SPA provided the plaintiff with the 'sole discretion to terminate' the SPA in the event the specified events did not happen by 28 November 2014. The plain reading of the words 'sole discretion to terminate' simply connoted the plaintiff was accorded an option to decide whether to end the SPA or not. A year and eight months after the deadline for the closing date, ie 20 November 2014, on 25 July 2016, the plaintiff through his solicitors informed the defendant that he decided to end the SPA. It could be seen that the plaintiff was clearly exercising a right to end or terminate the SPA. The plaintiff's purported exercise of the option to terminate the contract contradicted the plaintiff's case that the SPA was a contingent contract that became void by operation of law because the condition was not fulfilled by a fixed time. The plaintiff was accorded an option in the SPA to terminate the contract if a condition did not materialise. Clearly such a provision indicated that it was not the parties' intention for the SPA to become void if the alleged condition mentioned in the termination clause was not fulfilled by the deadline for the closing date. The plaintiff's counsel had relied solely on s 36 of the CA for the refund of the money paid to the defendant. The court, after having scrutinized the nature of the contract, found that the SPA could not be a contingent contract. Hence, the plaintiff's claim should fail (see paras 45–49).

(3) The plaintiff's conduct of paying the consideration sum in full before the two events for the closing date had materialised, and the plaintiff's conducts subsequent to that support a finding that the plaintiff had waived the condition for the two events for the closing date, in particular the signing of the operation agreement, to be fulfilled for the completion of the sale of shares in the SPA, and a further finding that the plaintiff had elected not to terminate but to proceed with the SPA. The court, therefore, found that the plaintiff could no longer rely on article 4.6 to terminate the SPA by the issuance of a notice dated 25 July 2016 from his solicitors. The court held that the plaintiff was estopped from relying on the non-fulfilment of the signing of the operation agreement by 28 November 2014 to terminate the SPA (see para 64).

[Bahasa Malaysia summary

Ini adalah tuntutan plaintif untuk pembayaran semula wang yang telah dibayar kepada defendan menurut perjanjian pembelian saham bertarikh 7 Januari 2014 ('SPA tersebut') yang, menurut naratif plaintif, kekal sebagai ditamatkan. Menurut SPA, plaintif bersetuju untuk membeli dan defendan bersetuju untuk menjual 625,000 saham ('saham tersebut') dalam sebuah syarikat asing yang diperbadankan dikenali sebagai Xianda International (HK) Ltd (yang sebelum ini dikenali sebagai Enersave International (HK) Ltd) untuk jumlah balasan sebanyak RMB5,739,093. Pihak-pihak bersetuju jumlah RMB5,739,093 bersamaan dengan RM3 juta ('jumlah balasan tersebut'). Pembayaran jumlah balasan adalah dalam dua peringkat. Bayaran pertama berjumlah RM2,954,388.44 akan dibayar dalam tempoh satu bulan selepas SPA ditandatangani. Bayaran kedua atau bayaran akhir berjumlah RM45,611.56 dibayar dalam tempoh dua bulan dari 'tarikh tutup'. Menurut plaintif, beliau telah meremitkan sejumlah RM2,994,600.50 kepada pihak ketiga bernama South Malaysia Industries Bhd ('SMI Bhd') dalam tempoh sebulan selepas SPA ditandatangani. Walaupun wang tersebut telah dibayar kepada SMI Bhd, bayaran tersebut bertujuan untuk pembayaran peringkat pertama jumlah balasan, yang dinyatakan plaintif. Plaintif seterusnya menegaskan bahawa dalam SPA, defendan telah bersetuju bahawa jumlah balasan penuh akan dibayar kepada SMI Bhd. Ini kerana salah satu syarikat defendan, iaitu Enersave Projects Sdn Bhd, berhutang sejumlah RM2,994,600.50 kepada SMI Bhd. Plaintif juga menegaskan bahawa amaun yang perlu dibayar untuk jumlah balasan pertama adalah hanya RM2,954,388.44, tetapi beliau telah membayar RM2,994,600.50 kepada SMI Bhd. Jumlah tambahan sebanyak RM40,212.06 adalah bertujuan untuk menjelaskan sepenuhnya hutang tertunggak, iaitu RM2,994,600.50, terhutang kepada SMI Bhd oleh syarikat defendan. Plaintif seterusnya menegaskan bahawa bayaran tambahan sebanyak RM40,212.06 kepada SMI Bhd akan dianggap sebagai pendahuluan kepada defendan. Tiada pertikaian berhubung pembayaran peringkat pertama jumlah balasan yang telah dibayar dalam masa yang ditetapkan. Berkenaan dengan pembayaran peringkat kedua jumlah balasan, pembayaran sepatutnya dibuat dalam tempoh dua bulan dari 'tarikh tutup' mengikut artikel 1.3(b) SPA tersebut. Tafsiran 'tarikh tutup' dalam artikel 4.1 merujuk kepada dua peristiwa tertentu yang telah berlaku pada atau sebelum 28 November 2014. Peristiwa pertama ialah Xianda (Tianjin) Seawater Resources Development Co Ltd dan Kawasan Pembangunan Ekonomi-Teknologi Tianjin (TEDA)/pihak berkuasa yang berkaitan perlu memeterai perjanjian operasi ('peristiwa pertama'); dan peristiwa kedua adalah kelulusan laporan kajian kemungkinan ('peristiwa kedua'). Tidak dipertikaikan bahawa peristiwa kedua telah berlaku sebelum 28 November 2014, tetapi bukan peristiwa pertama. Plaintif menegaskan bahawa oleh kerana peristiwa pertama tidak berlaku pada atau sebelum 28 November 2014, oleh itu, kerbergantungan kepada artikel 4.6 SPA, plaintif

berhak menggunakan haknya untuk menamatkan SPA. Keseluruhan tuntutan plaintif adalah berdasarkan artikel 4.6 SPA. Plaintif menegaskan bahawa oleh kerana peristiwa pertama, peristiwa tertentu, tidak berlaku pada masa yang ditetapkan, oleh itu, plaintif berhak untuk menamatkan SPA, dan wang yang dibayar akan menjadi pinjaman berjangka. Oleh itu, defendan akan bertanggungjawab untuk membayar balik wang tersebut kepada plaintif pada atau sebelum 28 November 2016. Pada 25 Julai 2016, selepas kira-kira satu tahun lapan bulan dari tarikh akhir tarikh tutup, plaintif melalui peguam caranya mengeluarkan surat tuntutan untuk memaklumkan defendan bahawa plaintif telah memutuskan untuk menamatkan SPA. Jumlah 'balasan pembelian' yang dirujuk dalam surat peguam cara adalah untuk jumlah RMB5,739,093 (yang bersamaan dengan RM3 juta mengikut SPA). Defendan tidak membayar balik plaintif jumlah yang dituntut pada tarikh tamat tempoh pada 28 November 2016. Oleh itu, plaintif membawa tindakan terhadap defendan pada Julai 2017. Defendan sebaliknya, berpendapat bahawa plaintif telah menamatkan SPA secara salah dan tuntutannya sepatutnya ditolak.

Diputuskan, menolak tuntutan dengan kos:

(1) Mengenai fakta semasa, mahkamah mendapati bahawa pembentukan SPA tidak disyaratkan kepada kedua-dua peristiwa yang berlaku untuk tarikh tutup. Kedua-dua peristiwa yang tidak berlaku pada tarikh akhir tarikh tutup tidak menjadikan SPA terbatal. Penandatanganan perjanjian operasi tidak menjadi sebahagian daripada pembentukan SPA. Berdasarkan artikel 1.3(b) dan 4.1 SPA, kejadian peristiwa pertama, iaitu menandatangani perjanjian operasi, hanyalah syarat yang berkaitan dengan pelaksanaan tempoh pembayaran peringkat kedua daripada jumlah balasan. Syarat tersebut tiada kaitan dengan pembentukan kontrak. Kegagalan syarat tersebut tidak menggagalkan pembentukan SPA. Oleh itu, syarat berlakunya peristiwa pertama pada atau sebelum masa yang ditetapkan adalah 'hanya berkaitan dengan kewajipan atau tempoh kontrak yang telah mengikat'. Syarat berlakunya peristiwa pertama pada atau sebelum tarikh tutup tidak melayakkan SPA menjadi kontrak luar jangka. Atas sebab ini, mahkamah tidak boleh bersetuju dengan hujahan peguam cara plaintif bahawa SPA adalah kontrak luar jangka dalam pengertian Akta Kontrak (lihat perenggan 43–44).

(2) Satu lagi sebab mengapa mahkamah tidak bersetuju dengan hujahan peguam cara plaintif bahawa SPA adalah kontrak luar jangka adalah — sekiranya SPA adalah kontrak luar jangka, SPA menjadi terbatal oleh kuat kuasa undang-undang jika syarat tersebut tidak dipenuhi pada masa yang ditetapkan tanpa sebarang keperluan untuk pihak memilih untuk menamatkan SPA. Dalam kes semasa, artikel 4.6 SPA memberikan plaintif 'budi bicara mutlak untuk menamatkan' SPA sekiranya peristiwa yang dinyatakan tidak berlaku pada 28 November 2014. Pembacaan

biasa perkataan 'budi bicara mutlak untuk menamatkan' hanya bermaksud plaintif diberi pilihan untuk memutuskan sama ada untuk menamatkan SPA atau tidak. Setahun lapan bulan selepas tarikh akhir tarikh tutup iaitu 20 November 2014, pada 25 Julai 2016, plaintif melalui peguam caranya memaklumkan defendan memutuskan untuk menamatkan SPA. Ia dapat dilihat bahawa plaintif jelas menggunakan hak untuk menamatkan atau membatalkan SPA. Tindakan plaintif yang dikatakan melaksanakan opsyen untuk menamatkan kontrak bercanggah dengan kes plaintif bahawa SPA adalah kontrak luar jangka yang menjadi terbatal oleh kuat kuasa undang-undang kerana syarat tersebut tidak dipenuhi dalam masa yang ditetapkan. Plaintif diberi pilihan dalam SPA untuk menamatkan kontrak jika syarat tidak menjadi kenyataan. Jelas sekali peruntukan sedemikian menunjukkan bahawa bukan niat pihak-pihak untuk SPA terbatal sekiranya syarat yang didakwa yang disebut dalam klausa penamatan tidak dipenuhi pada tarikh akhir tarikh tutup. Peguamcara plaintif hanya bergantung pada s 36 Akta Kontrak untuk pemulangan wang yang telah dibayar kepada defendan. Mahkamah, selepas meneliti jenis kontrak, mendapati bahawa SPA tidak boleh menjadi kontrak luar jangka. Oleh itu, tuntutan plaintif seharusnya gagal (lihat perenggan 45–49).

(3) Tindakan plaintif membayar jumlah balasan sepenuhnya sebelum kedua-dua peristiwa untuk tarikh tutup telah menjadi kenyataan, dan tindakan plaintif selepas itu menyokong dapatan bahawa plaintif telah mengetepikan syarat bagi kedua-dua peristiwa untuk tarikh tutup, khususnya menandatangani perjanjian operasi, yang akan dipenuhi untuk penyempurnaan penjualan saham dalam SPA, dan dapatan lanjut bahawa plaintif telah memilih untuk tidak menamatkan tetapi meneruskan SPA. Oleh itu, mahkamah mendapati plaintif tidak lagi boleh bergantung kepada artikel 4.6 untuk menamatkan SPA dengan mengeluarkan notis bertarikh 25 Julai 2016 daripada peguamcaranya. Mahkamah memutuskan bahawa plaintif telah dihalang daripada bergantung kepada ketidakpenuhan menandatangani perjanjian operasi sebelum 28 November 2014 untuk menamatkan SPA (lihat perenggan 64).]

Cases referred to

Betsan Sdn Bhd v Norhaidi Che Dan @ Che Din & Anor [2014] 5 MLJ 137, CA (distd)

Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd [2003] 3 MLJ 152; [2003] 3 CLJ 201, CA (refd)

Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24, SC (refd)

Summit Domain Sdn Bhd & Anor v Carillon Sdn Bhd [2020] 2 MLJ 96; [2020] 2 CLJ 329, CA (refd)

A *Wisma Denmark Sdn Bhd v Landcorp Finance Bhd* [2007] 7 MLJ 757; [2008] 1 CLJ 704, HC (refd)
Yakinline Marketing Sdn Bhd v Mayban Securities Sdn Bhd [2013] 5 MLJ 677, CA (refd)

B **Legislation referred to**

Contracts Act 1950 ss 32, 33, 33(b), 36, 36(1), Part IV

Asok Kandiah (Navindran Sivarajah with him) (Kandiah Partnership) for the plaintiff.
C *Shanmuga K (Ng Chek and Jonas Lee with him) (Ng Chek & Co) for the defendant.*

Choo Kah Sing J:

D INTRODUCTION

[1] The plaintiff's claim is for a refund of money paid to the defendant pursuant to a share purchase agreement dated 7 January 2014 ('the SPA') which, according to the plaintiff's narrative, stood as terminated. The parties
E have gone through a full trial. On 26 July 2021, this court dismissed the plaintiff's claim. The reasons for the decision are set out as below.

THE BACKGROUND FACTS

F **[2]** According to the SPA, the plaintiff agreed to purchase and the defendant agreed to sell 625,000 shares ('the shares') in a foreign incorporated company known Xianda International (HK) Ltd (which was previously known as Enersave International (HK) Ltd) for a consideration sum of RMB5,739,093. The parties agreed the amount of RMB5,739,093 was
G equivalent to RM3m ('the consideration sum').

[3] The payment of the consideration sum was in two tranches. The first payment totalling RM2,954,388.44 was to be paid within one month upon the signing of the SPA. The second payment or the final payment totalling
H RM45,611.56 was payable within two months from the 'closing date'. Article 1.3(b) of the SPA in respect of the second payment states as follows:

> 1.3 *Terms and Conditions of Payment*
>
> *a) First Payment*
>
> I ...;
>
> *b) Final Payment*
>
> Ringgit Malaysia Forty Five Thousand Six Hundred Eleven And Cents Fifty Six (RM45,611.56) shall be payable within two (2) months from the Closing Date to South Malaysia Industries Berhad as designated by the Vendor subject to the

execution of the relevant transfer documents by the Parties for the transfer and registration of the Sale Shares with the relevant authorities in Hong Kong.

[4] The meaning of 'closing date' is found in article 4.1 of the SPA which states as follows:

> 4.1 The closing shall take place on the day the conditions pertaining to the Nangang Project between XIANDA and the Tianjin Economic-Technological Development Area (hereinafter referred to as 'TEDA')/relevant authorities as follows are obtained by 28th November 2014:
>
> (a) the signing of the Operational Agreement; and
>
> (b) the Approval of the Feasibility Study Report
>
> (hereinafter referred to as the 'Closing Date')

(Note: In the SPA, 'XIANDA' refers to XIANDA (Tianjin) Seawater Resources Development Co Ltd, a company incorporated in the People's Republic of China which was involved in the Nangang Seawater Desalination and Salt-Making Project known as the 'Nangang Project'.)

[5] According to the plaintiff, he remitted a sum of RM2,994,600.50 to a third party named South Malaysia Industries Bhd ('SMI Bhd') within a month after the SPA was executed. Although the money was paid to SMI Bhd, the payment was meant for the payment of the first tranche of the consideration sum, the plaintiff averred.

[6] The plaintiff further averred that in the SPA the defendant had agreed that the full consideration sum was to be paid to SMI Bhd. This was because one of the defendant's companies, ie Enersave Projects Sdn Bhd, owed a sum of RM2,994,600.50 to SMI Bhd.

[7] The plaintiff also further averred that the amount to be paid for the first tranche of consideration sum was only RM2,954,388.44, but he had paid RM2,994,600.50 to SMI Bhd. The extra sum of RM40,212.06 was meant to settle the full outstanding debt, ie RM2,994,600.50, owing to SMI Bhd by the defendant's company. The plaintiff further averred that the extra payment of RM40,212.06 to SMI Bhd was to be treated as an advance to the defendant.

[8] There was no dispute in respect of the payment of the first tranche of the consideration sum which was paid within the stipulated time.

[9] With regard to the payment of the second tranche of the consideration sum, the payment was supposed to be made within two months from the closing date according to article 1.3(b) of the SPA.

[10] The definition of closing date in article 4.1 refers to two specified events having materialised on or before 28 November 2014.

[11] The first event was that Xianda (Tianjin) Seawater Resources Development Co Ltd and Tianjin Economic-Technological Development Area (TEDA)/relevant authorities had to enter into an operation agreement ('the first event'); and the second event was the approval of the feasibility study report ('the second event').

[12] It was not in dispute that the second event had materialised before 28 November 2014, but not the first event. The plaintiff contended that since the first event did not materialise on or before 28 November 2014, therefore, relying on article 4.6 of the SPA, the plaintiff was entitled to exercise his right to terminate the SPA, or in the words of the plaintiff's counsel, the SPA 'stands terminated'.

[13] Article 4.6 of the SPA states as follows:

> 4.6 Time shall be of essence of this Agreement. The Purchaser [the plaintiff] shall at his sole discretion to terminate this Agreement if the Closing Date shall not be materialization on or before 28th November 2014. In the event of such termination by the Purchaser, the purchase price of Chinese Yuan Five Million Seven Hundred Thirty Nine Thousand And Ninety Three (RMB5,739,093) paid to the Vendor [the defendant] shall be converted into a Term Loan to be repaid on or before 28th November 2016.

[14] The entire plaintiff's claim was premised on article 4.6 of the SPA. The plaintiff asserted that since the first event, a specified event, did not materialise on the stipulated time, therefore, the plaintiff was entitled to terminate the SPA, and the money paid would become a term loan. The defendant would, therefore, become liable to repay the money to the plaintiff on or before 28 November 2016.

[15] On 25 July 2016, after a lapse of approximately one year and eight months from the deadline for the closing date, the plaintiff through his solicitors issued a letter of demand to inform the defendant that the plaintiff had decided to terminate the SPA. The plaintiff's firm of solicitors wrote, inter alia, as follows:

> 4. You are well aware that the events described have not materialised on or before the Closing Date of 28-11-2014. Hence, we are instructed by our client to inform you of his decision to terminate the Agreement.
>
> 5. Given the termination of the Agreement by our client, the purchase consideration shall be repaid by you to our client on or before 28-11-2016.

6. Our client instructs us to inform you that in the event you fail and/or refuse to remit to our client the purchase consideration on or before 28-11-2016, our client shall commence legal proceedings against you without further reference, in which event you shall also be held liable for all costs and expenses incurred thereby

[16] The amount of the 'purchase consideration' referred to in the solicitors' letter was for the sum of RMB5,739,093.00 (which is equivalent to RM3m as per the SPA).

[17] The defendant did not repay the plaintiff the demanded sum by the due date on 28 November 2016. Hence, the plaintiff brought this action against the defendant in July 2017.

[18] The defendant's defence, in gist, contended that the plaintiff did not take immediate action right after 28 November 2016 to terminate the SPA, but elected to terminate the SPA only after one year and eight months had passed since the deadline for the closing date on 28 November 2016, therefore, the deadline for the closing date, or the stipulated time frame for the first event to happen on or before 28 November 2014, had been enlarged, and the plaintiff was estopped from terminating the SPA.

[19] The defendant further contended that the operation agreement was eventually executed on 3 November 2016, approximately three months after the plaintiff's solicitors' letter of demand was sent, as such, there was accord and satisfaction which, therefore, rendered the SPA as completed. The defendant also contended, among other things, the plaintiff had contributed to the delay of the execution of the operation agreement in that he had full control of the company which was supposed to execute the said agreement with the Tianjin Economic-Technological Development Area and that the plaintiff had requested the signing of the operation agreement to coincide with the visit of the Malaysian's Prime Minister. The defendant also complained that the consideration sum was paid to SMI Bhd, a company that belonged to the plaintiff.

[20] The defendant further complained that the share value of the company Xianda International (HK) Ltd was no longer the same as before because it no longer has any interest in the Nangang project.

[21] Initially, Xianda International (HK) Ltd owned 100% of Xianda Holding (HK) Ltd which in turn owned 100% of Xianda (Tianjin) Seawater Resources Development Co Ltd, a company that was directly involved in the Nangang project, a seawater desalination and salt making project in Tianjin, Republic of China, which has a sizable value worth around RMB15 billion.

[22] At present, Xianda Holding (HK) Ltd is no longer owned by Xianda International (HK) Ltd, but by Cirrus Ventures Ltd, a company incorporated in the British Virgin Islands (BVI). The sale of Xianda Holding (HK) Ltd to Cirrus Ventures Ltd was caused by the plaintiff, as the plaintiff was and still is the major shareholder in Xianda International (HK) Ltd. The share value of Xianda International (HK) Ltd plummeted after the sale of the company Xianda Holding (HK) Ltd, as such, any claim of restitution by the plaintiff would be unreasonable and unjust, the defendant averred.

[23] Based on the above defences and averments, the defendant contended that the plaintiff had wrongfully terminated the SPA and his claim ought to be dismissed.

THE FINDINGS OF THIS COURT

[24] The plaintiff's counsel submitted that the happening of the two events were condition precedents for the completion of the SPA. It is not in dispute that the first event did not materialise on 28 November 2014. Article 4.6 of the SPA came into operation because time was of essence in the SPA. The consideration sum would become a term loan and it had to be repaid to the plaintiff on or before 28 November 2016, the plaintiff's counsel further submitted.

[25] The plaintiff's counsel relied on ss 33 and 36 of the Contracts Act 1950 ('the CA') to argue that non happening of the first event on a fixed time had resulted in the SPA standing terminated.

[26] For ease of reference, ss 33 and 36 of the CA are reproduced as below:

> 33 Enforcement of contracts contingent on an event happening.
>
> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.
>
> 36 When contracts become void which are contingent on happening of specified event within fixed time.
>
> (1) Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible.
>
> (2) ...

[27] The plaintiff's counsel submitted that the SPA was a 'contingent

contract' within Part IV of the CA. The plaintiff's counsel further submitted that s 36 of the CA would render the SPA terminated, ie void. This court could not agree with the plaintiff's counsel's submission.

[28] Contingent contract is defined as 'a contract to do or not to do something, if some event, collateral to the contract, does or does not happen' (see s 32 of the CA). In other words, the formation of a contract is essentially dependent on the happening of a specified event or on a specified event not happening. The illustration in s 32 states: 'A contract to pay B $10,000.00 if B's house is burnt. This is a contingent contract'. The specified event in the illustration is that B's house is burnt. The illustration must be understood in the context of the framework of Part IV of the CA.

[29] Not every clause providing for a condition that is found in a contract will render the contract a contingent contract. In Sinnadurai, *Law of Contract* (4th Ed, LexisNexis 2011), Vol 1, p 116, it states as follows:

> It is sometimes said that the term 'condition' is capable of bearing a number of different meanings. It is, however, important to draw a distinction between a condition that affects the formation of a contract and a condition that merely relates to an obligation or term of an already binding contract. A condition which affects the formation of a contract of sale, as in a conditional contract, is therefore referred to as a contingent condition whereas one which relates to the performance of a term of a contract is described as a promissory condition: see *Chitty on Contracts, General Principles* (30th edition) paragraphs 12–025 to 12–030 The Federal Court in *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 accepted this distinction.

[30] Based on the above passage, the formation of the contract must be dependent on the happening or fulfilment of the specified event, ie the condition for the contract, because the condition forms part of the formation of the contract. If the specified event, whether the happening or the non happening of the event, whichever is applicable, is not fulfilled, the contract cannot be enforced by law.

[31] The specified event is so important to the formation of the contract that if the specified event becomes impossible, the contract becomes void (see s 33(b) of the CA), not voidable.

[32] Illustration (c) in s 33 states: 'A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract become void'. This illustration demonstrates that the specified event or the condition, ie B marries C, is essential for the formation of the contact. When C dies, the contract becomes void by operation of law. The contract has to be void by law because the happening of the specified event, ie B marries C, has now become

impossible, which in turn renders the contract impossible.

[33] In the event the happening of the specified event is to happen within a fixed time, but it did not happen within the fixed time or becomes impossible to happen before the fixed time, the contract becomes void at the expiration of the stipulated fixed time. Illustration (a) in s 36 states: 'A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year'. Again, in this illustration, the condition, ie the return of a certain ship, is crucial to the formation of the contract. If the ship is burnt, the specified event, ie the return of the ship, becomes impossible to happen even before the stipulated fixed time, the contract becomes void. The contract has to be void by law because the happening of the specified event has now become impossible which in turn renders the contract impossible.

[34] The above illustrations encapsulate the true character of a condition in a contract that could fall within the meaning of a contingent contract. The condition has to be so essential that it forms part of the formation of the contract and that if it becomes impossible or it is not fulfilled, it would strike at the very root of the contract that the parties have entered into.

[35] The plaintiff's counsel cited numerous cases in support of his contention that the SPA was a contingent contract. Unfortunately, these cases turn on their own facts and do not support the present facts of the plaintiff's case.

[36] In *Jaafar bin Ibrahim v Gan Kim Kin* [1985] 2 MLJ 24 (SC), the respondent, the registered owner of a piece of land, promised to transfer her half share in the land to the appellant if the appellant could obtain approval for the conversion and subdivision of the land from the state authority of Negeri Sembilan on or before a fixed time, ie 31 December 1977. On the due date, the approval of the state authority was not obtained. Clearly, the non fulfilment of the condition, ie state authority's approval to convert and subdivide the land on the fixed time, struck at the root of the contract to transfer half share of the land to the appellant. The respondent land was not converted or subdivided by 31 December 1997, therefore, the performance and completion of the promise, ie to transfer half share of the converted and subdivided land to the appellant, was legally impossible by that date. Although the state authority's approval was obtained after the fixed time, the contract had by operation of law become void upon the expiration of the fixed time pursuant to s 36(1) of the CA.

[37] In *Wisma Denmark Sdn Bhd v Landcorp Finance Bhd* [2007] 7 MLJ 757; [2008] 1 CLJ 704 (HC), as far as the sale and purchase agreement (of the

properties) was concerned, the contract was conditioned upon two approvals, one from the board of directors and the other from the Foreign Investment Committee (FIC). Again, the contract depended on the fulfilment of the specified events which struck at the root of the contract. Without the approvals, the completion of the contract could not be legally performed and became impossible to complete.

[38] In *Yakinline Marketing Sdn Bhd v Mayban Securities Sdn Bhd* [2013] 5 MLJ 677 (CA), the parties bickered over whose fault had caused the failure of the fulfilment of certain specified events, one of which was to obtain the approval from relevant authority for the sale and purchase of company shares. Again, in the absence of the relevant authority's approval (the specified event), the completion of the contract would be legally impossible.

[39] In *Summit Domain Sdn Bhd & Anor v Carillon Sdn Bhd* [2020] 2 MLJ 96; [2020] 2 CLJ 329 (CA), the sale and purchase agreement of a piece of land was conditioned upon a final determination of the decision of the court in relation to the ownership of the land. Without the final determination of the court on the rightful ownership of the land, the completion of the contract was legally impossible.

[40] In *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* [2003] 3 MLJ 152; [2003] 3 CLJ 201 (CA), the sale and purchase agreement of a piece of land was contingent upon the approval of the Foreign Investment Committee (FIC). Again, without the FIC's approval, the completion of the sale of the land was legally impossible.

[41] The case of *Betsan Sdn Bhd v Norhaidi Che Dan @ Che Din & Anor* [2014] 5 MLJ 137 (CA), was inaptly cited by the plaintiff's counsel. It is not a case that relates to a contingent contract. It is a case about certain conditions precedent in a contract that were not fulfilled. In those circumstances, the appellant/innocent party had rightfully elected to rescind the contract and was entitled to the refund of the money paid. The appellant in that case did not argue the contract was a contingent contract for the refund of the money paid. Whereas, in our present case, the plaintiff's counsel had relied on ss 33 and 36 of the CA as the basis of the plaintiff's claim for the return of the money paid. Hence, the plaintiff's counsel has misconstrued the legal principles in the case cited.

[42] The common thread found in the above cases, other than *Betsan Sdn Bhd*, is that the contract was rooted in the fulfilment of the stipulated condition(s) within a fixed time. The non fulfilment of the condition(s) by a fixed time went to the formation of the contract. Hence, the contract became void pursuant to s 36 of the CA by operation of law.

A **[43]** On the present facts, this court finds that the formation of the SPA was not conditioned on the materialisation of the two events for the closing date. The non happening of the two events by the deadline for the closing date did not render the SPA void. The signing of the operation agreement did not form part of the formation of the SPA. Based on articles 1.3(b) and 4.1 of the SPA,
B the happening of the first event, namely the signing of the operation agreement, was merely a condition relating to the performance of the term for payment of the second tranche of the consideration sum which is described as a promissory condition in *Sinnadurai*. The condition has nothing to do with the formation of the contract.
C

[44] The non fulfilment of the condition did not strike at the formation of the SPA. Hence, the condition of the happening of the first event on or before the fixed time was 'merely related to an obligation or term of an already binding
D contract'. The condition of the happening of the first event on or before the closing date did not qualify the SPA to be a contingent contract. For this reason, this court could not agree with the plaintiff's counsel's submission that the SPA was a contingent contract within the meaning of the CA.

E **[45]** Another reason why this court could not agree with the plaintiff's counsel's submission that the SPA was a contingent contract is this — if the SPA is a contingent contract, the SPA becomes void by operation of law if the condition is not fulfilled by a fixed time without any need for a party to elect to terminate the SPA.
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[46] In the present case, article 4.6 of the SPA provided the plaintiff the 'sole discretion to terminate' the SPA in the event the specified events did not happen by 28 November 2014. The plain reading of the words 'sole discretion to terminate' simply connotes the plaintiff was accorded an option to decide
G whether to end the SPA or not. A year and eight months after the deadline for the closing date, ie 20 November 2014, on 25 July 2016, the plaintiff through his solicitors informed the defendant that he decided to end the SPA.

H **[47]** It could be seen that the plaintiff was clearly exercising a right to end or terminate the SPA when his solicitors' letter expressed his client's intention in the following words:

> ... we are instructed by our client to inform you of *his decision to terminate* the Agreement
>
I > *Given the termination* of the Agreement *by our client* ...

[48] The plaintiff's purported exercise of the option to terminate the contract contradicts the plaintiff's case that the SPA was a contingent contract that became void by operation of law because the condition was not fulfilled by

a fixed time. The plaintiff was accorded an option in the SPA to terminate the contract if a condition did not materialise. Clearly such a provision indicates that it was not the parties' intention for the SPA to become void if the alleged condition mentioned in the termination clause was not fulfilled by the deadline for the closing date.

[49] The plaintiff's counsel had relied solely on s 36 of the CA for the refund of the money paid to the defendant. This court, after having scrutinised the nature of the contract as explicated above, finds the SPA could not be a contingent contract. Hence, the plaintiff's claim should fail. For completeness, this court would proceed to discuss the lawfulness of the plaintiff's termination of the SPA.

[50] This court is of the considered view that the plaintiff's termination of the SPA was not lawful as a result of the plaintiff's actions and conduct below.

[51] Firstly, this court is of the view that it is a material fact that the plaintiff had paid the consideration sum in full before the closing date without requiring the materialisation of the two events. In the plaintiff's solicitors' letter dated 25 July 2016, the plaintiff acknowledged he had paid the 'purchase consideration' when he asked for it to be refunded. It was only in court that the plaintiff had attempted to change his stand by saying only the first tranche of the consideration was paid; whereas, the excess amount, ie RM40,212.06, was an advancement to the defendant, not part of the consideration sum.

[52] According to the terms of the SPA, the plaintiff needed only to pay the first tranche of the consideration sum, not the full consideration sum. The second tranche of payment of the consideration sum was supposed to be paid only if the first and second events had materialised by the closing date.

[53] The plaintiff averred that the excess amount, ie RM40,212.06, from the first tranche of the payment of the consideration sum was meant to be an advance to the defendant. This could not be true; it was an afterthought explanation, because the plaintiff's solicitors' notice dated 25 July 2016 referred to the sum paid by the plaintiff as the 'purchase consideration'. Therefore, the payment made by the plaintiff, ie the sum of RM2,994,600.50 to SMI Bhd, was in fact treated by the plaintiff as full consideration sum.

[54] The defendant's narrative was he had accepted the plaintiff's payment to SMI Bhd as the full consideration sum for the SPA because it was only short of a difference of RM5,399.50 (RM3m less RM2,994,600.50). The defendant had executed all related documents for the transfer of the shares to the plaintiff and those documents were delivered to the plaintiff. The plaintiff could cause

A the transfer of the shares anytime he wished. The court finds the defendant's explanation on the amount paid as full consideration sum is more convincing.

[55] By paying the purchase consideration in full and accepting the signed share transfer documents from the defendant, the plaintiff had, in fact, waived the condition for the materialisation of the two events stated in article 4.1 of the SPA for the completion of the sale of the shares in the SPA.

[56] Secondly, the plaintiff testified that he had on numerous occasions informed the defendant orally to repay the money after the deadline for the closing date. The defendant refuted the plaintiff's narrative. The plaintiff's testimony could not be given much weight by this court, because it is not consistent with the plaintiff's conduct after 28 November 2014 and with his solicitors' letter dated 25 July 2016. The plaintiff's solicitors' letter clearly stated that the plaintiff decided to terminate the SPA only on July 2016, not earlier.

[57] The plaintiff did not exercise his option to terminate when the first event from the deadline for the closing date did not materialise by 28 November 2014. The plaintiff only informed the defendant of his intention to terminate the SPA after one year and eight months from the deadline for the closing date.

[58] The provision in article 4.6 of the SPA for the conversion of the consideration sum to a term loan to be repaid by a specified date indicates that it was the parties' intention for the plaintiff to exercise the option to terminate the SPA once the deadline for the closing date had passed and the two events did not happen. Unfortunately, the plaintiff did not do so. The plaintiff had waited one year and eight months after the deadline for the closing date to terminate the SPA. The plaintiff's failure to exercise his option to terminate the SPA within a reasonable time had indicated to the defendant that the plaintiff intended to proceed with the SPA after the deadline for the closing date although the first event did not materialise.

[59] Thirdly, after the expiry of the deadline for the closing date, the plaintiff did not return to the defendant the executed documents for the transfer of the shares which were delivered to him by the defendant earlier. The plaintiff's conduct in holding on to the said documents indicated he would be continuing with the completion of the SPA.

[60] Fourthly, the plaintiff continued to pursue for the operation agreement to be executed even after the deadline for the closing date. The plaintiff's actions subsequent to the deadline for the closing date indicated his intention to continue with the completion of the SPA. In evidence, the plaintiff told the

court that he would want the operation agreement to be executed as soon as possible, because he had invested a substantial amount of money to see through the successful cooperation of the Nangang project.

[61] Fifthly, this court observes that the defendant could not be faulted for the non-materialisation of the first event by the deadline for the closing date because the SPA did not impose any obligation on the defendant to procure or ensure the operation agreement was executed before the deadline for the closing date.

[62] Lastly, the plaintiff asserted that it was the defendant's obligation to ensure the operation agreement be executed before the closing date. this court could not agree with the plaintiff's assertion. Nowhere in the SPA is it stated that it was the defendant's obligation to ensure the operation agreement was executed before the deadline for the closing date. It was clear in evidence that the defendant was not the prime mover to ensure the operation agreement was executed before the deadline for the closing date. The defendant explained that he played a small part in relation to the operation agreement in that he was only charged with the technical aspect of the agreement, not the commercial aspect. The negotiation of the commercial terms were not within the defendant's purview. Further, the defendant was not the one who determined when the operation agreement could be executed. The defendant averred it was the plaintiff who was in control of the timing for the signing of the operation agreement and it was the plaintiff who decided the signing should coincide with the visit of the Prime Minister of Malaysia.

[63] It is evident that the plaintiff had a major role in the Nangang project because he had controlled over the Xianda International (HK) Ltd as well as Xianda Holding (HK) Ltd which was eventually sold to a BVI company. The plaintiff's involvement in the negotiation of the operation agreement subsequent to the deadline for the closing date clearly had indicated he had no intention to terminate the SPA.

[64] In summary, the plaintiff's conduct of paying the consideration sum in full before the two events for the closing date had materialised, and the plaintiff's conducts subsequent to that support a finding that the plaintiff had waived the condition for the two events for the closing date, in particular the signing of the operation agreement, to be fulfilled for the completion of the sale of shares in the SPA, and a further finding that the plaintiff had elected not to terminate but to proceed with the SPA. The court, therefore, finds that the plaintiff could no longer rely on article 4.6 to terminate the SPA by the issuance of a notice dated 25 July 2016 from his solicitors. This court holds that the plaintiff is estopped from relying on the non fulfilment of the signing of the operation agreement by 28 November 2014 to terminate the SPA.

A **[65]** This court has considered the defendant's counsel other submissions, such as the plaintiff was in control of several companies related to the defendant; the consideration sum was paid to SMI Bhd, a company that the plaintiff owned; there was accord and satisfaction because the operation agreement was ultimately executed; restitution was not possible because of the
B value of the shares is no longer the same as before. In view of the court's findings as set out before this, all these issues raised by the defendant's counsel are not material for the court's decision.

CONCLUSION

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[66] For the reasons stated above, this court dismissed the plaintiff's claim and ordered the plaintiff to pay costs of RM50,000 to the defendant.

Claim dismissed with costs.

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Reported by Nuzul Fitrie

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